(4)

Supreme Court, U.S.
FILED
MAY 14 2001
OFFICE OF THE CLERK

No. 00-1375

IN THE

Supreme Court of the United States

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ,

Petitioners,

v.

ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

REPLY BRIEF

DOUGLASS W. CASSEL
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-2224

Attorney for Petitioner Consul General for the Republic of Poland in Chicago

CHARLES F. SMITH
Counsel of Record
CHRISTINA M. TCHEN
AMARJEET S. BHACHU
333 West Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 407-0700

STEPHEN E. EBERHARDT
4744 West 135th Street
Crestwood, Illinois 60445
(708) 371-8560

Attorneys for Petitioner Gregory A. Madej

167082

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

14 pp

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

I. There Is No Adequate And Independent State Ground Barring Review 1

A. The Respondents Do Not Address the Fact that the State Ground Asserted Is Not "Independent" 3

B. The State Grounds Asserted Are Not "Adequate" to Bar Review 4

II. The Petitioners Clearly Present Important Federal Issues For Review 6

TABLE OF CITED AUTHORITIES

Page

Cases:

Breard v. Greene, 523 U.S. 371 (1998) 2

City of Chicago v. Roman, 705 N.E.2d 81 (Ill. 1998) 3

Clay v. Kuhl, 727 N.E.2d 217 (Ill. 2000) 5

Federal Republic of Germany v. United States, 526 U.S. 111 (1999) 2

Ford v. Georgia, 498 U.S. 411 (1991) 4

Hildwin v. Florida, 490 U.S. 638 (1989) 4

Horn v. Horn, 125 N.E.2d 539 (Ill. App. Ct. 1955) 6

In re October 1985 Grand Jury No. 746, 530 N.E.2d 453 (Ill. 1988) 4

Lerner v. Zipperman, 387 N.E.2d 946 (Ill. App. Ct. 1979) 6

Nielsen v. Johnson, 279 U.S. 47 (1929) 2

People ex rel. Bier v. Scholz, 394 N.E.2d 1157 (Ill. 1979) 4

People ex rel. Daley v. Schreier, 442 N.E.2d 185 (Ill. 1982) 4

Cited Authorities

	Page
People ex rel. General Motors Corp. v. Bua, 226 N.E.2d 6 (Ill. 1967)	4
People ex rel. Meyer v. Kerner, 219 N.E.2d 617 (Ill. 1966)	6
People v. Ruiz, 742 N.E.2d 299 (Ill. 2000)	5
Teague v. Lane, 489 U.S. 288 (1989)	2
Wildenhus's Case, 120 U.S. 1 (1887)	2
United States Constitution:	
Eleventh Amendment	2
Statutes:	
28 U.S.C. § 1257	1
735 ILCS 5/14-101, *et seq.*	4
Rules:	
S. Ct. R. 15.2	1
S. Ct. R. 15.6	1
Other Authorities:	
Consular Convention, May 31, 1972, U.S.-Pol., art. 23, 24 U.S.T. 1231, T.I.A.S. No. 7642	2

The Consul General for the Republic of Poland in Chicago (the "Consul General") and Gregory Madej (collectively, the "Petitioners"), pursuant to Supreme Court Rule 15.6, respectfully submit this reply to the Respondents' Brief in Opposition (the "Opposition") to the Petition for a Writ of Certiorari (the "Petition").[1]

The Opposition is more notable for what it does *not* say than what it does say. Rule 15.2 of this Court requires a brief in opposition to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2. Given Respondents' almost complete failure to contest the compelling arguments made in support of the Petition, this Court should grant *certiorari*.

I. THERE IS NO ADEQUATE AND INDEPENDENT STATE GROUND BARRING REVIEW

With respect to procedural matters raised by the Opposition, it is important to begin by noting what the Respondents do not say. The Respondents do not contest any of the following points:

- This is not a last-minute request for review prior to a scheduled execution, and the Consul General has acted expeditiously to vindicate his rights under the Vienna Convention;
- This Court has jurisdiction under 28 U.S.C. § 1257;
- The Antiterrorism and Effective Death Penalty Act of 1996 does not apply;

---

1. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Petition.

- The retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) is not applicable;

- Eleventh Amendment principles are not implicated by this appeal; and

- Gregory Madej has standing to pursue this appeal.[2]

See Petition at 24-25. Accordingly, the Respondents concede that many of the issues that lead this Court to deny *certiorari* in *Breard v. Greene*, 523 U.S. 371 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), are not present in this case. Instead, the Respondents pin their hopes on the argument that there is an adequate and independent state ground barring review. For the reasons discussed below, the Respondents' argument fails.

---

2. As a result of this last concession, the Respondents' contention that the Republic of Poland does not have standing to pursue this appeal is not outcome determinative. *See* Petition at 25 (this case cannot turn on standing unless court adopts rule that no one may enforce treaty rights in court). Petitioners believe this position to be erroneous in any event and are prepared to address it on the merits. *See, e.g.*, *Wildenhus's Case*, 120 U.S. 1, 16 (1887) (noting there is "no reason why" consul general may not enforce rights arising from treaty); *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) (rights afforded party pursuant to an international treaty are to be liberally construed). Even if the Vienna Convention itself did not provide a right of action, the Consular Convention in effect between the Republic of Poland and the United States does. *See* Consular Convention, May 31, 1972, U.S.-Pol., art. 23, 24 U.S.T. 1231, T.I.A.S. No. 7642 (United States agrees Polish consular official can "address himself to the courts and other authorities of the receiving State" in order to "protect the rights and interests of the sending State and of its nationals").

A. The Respondents Do Not Address the Fact that the State Ground Asserted Is Not "Independent"

The Petition explained that there was no independent state ground barring review. Petition at 26-27. Specifically, the Petitioners noted that, as a procedural matter under Illinois law, a void order may be collaterally attacked at any time. *City of Chicago v. Roman*, 705 N.E.2d 81, 85 (Ill. 1998). Petitioners argued that as a substantive matter under international law, Gregory Madej's convictions and death sentence were void under the principle of *restitutio in integrum* (and thus, as a procedural matter could be collaterally attacked). The Illinois Supreme Court decided that Gregory Madej's convictions and death sentence were *not* void under international law, and therefore could not be collaterally attacked. (App. 7a) Clearly this decision did not rest on independent state grounds, as it required the Illinois Supreme Court to interpret international law.

The Opposition concedes that the Illinois Supreme Court addressed the application of international law. *See* Opposition at 9. However, the Opposition does not address how the Illinois Supreme Court's interpretation of international law amounts to an "independent" state ground. There is no dispute that state procedural law permits a collateral attack of a void order; the real dispute is whether, as a substantive matter, the international law of remedies renders the orders entered in this case void. The Petitioners believe the Illinois Supreme Court's analysis of international law and its application to this case was erroneous, and requires further review.

Second, the Opposition also does not begin to address how the denial of *mandamus* relief by the Illinois Supreme Court on the ground that the Petitioners had not shown a "clear, affirmative right to relief," Opposition at 10,

can possibly constitute an "independent" state ground barring review of the federal right asserted. *See* Petition at 27 (citing *Hildwin v. Florida*, 490 U.S. 638, 639 n.* (1989) (*per curiam*)).[3] The Respondents' total failure to respond to these arguments demonstrates that no independent state ground exists.

B. The State Grounds Asserted Are Not "Adequate" to Bar Review

Even if independent, a state law ground is not sufficient to preclude review by this Court where the grounds relied on are not firmly established or regularly followed. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Such is the case here.

First, as the Opposition notes, with respect to the *Mandamus* Petition, the Petitioners argued that they also were entitled to *mandamus* relief under a line of decisions that permitted the Illinois Supreme Court to issue *mandamus* relief when confronted with an issue of great public importance or an issue of great importance to the administration of justice.[4] Despite a long line of authority permitting *mandamus* relief to issue in these circumstances, the majority opinion, without citation to any authority, announced that the fact that the issues raised may have been of great public importance and of great importance to the administration of justice was not sufficient to sustain a

---

3. A showing of a clear, affirmative right to relief under Illinois' *mandamus* statute would not require a showing of compliance with a statute of limitations or other such similar procedural rule, because there is no applicable statute of limitations. *See* 735 ILCS 5/14-101, *et seq.*

4. (Joint Brief at 66 (citing *In re October 1985 Grand Jury No. 746*, 530 N.E.2d 453, 456 (Ill. 1988) (citing *People ex rel. General Motors Corp. v. Bua*, 226 N.E.2d 6 (Ill. 1967)); *People ex rel. Daley v. Schreier*, 442 N.E.2d 185, 187 (Ill. 1982); *People ex rel. Bier v. Scholz*, 394 N.E.2d 1157, 1158 (Ill. 1979)))

request for a writ of *mandamus*. (App. 11a) This departure from precedent constitutes a failure to adhere to a state rule that had been firmly and consistently applied in the past.[5]

Second, as the Opposition also notes, with respect to the 2-1401 Petition, the Petitioners argued in the alternative that the applicable statute of limitations could be tolled under the doctrine of equitable tolling. (Joint Brief at 62) The Illinois Supreme Court reaffirmed the existence of the doctrine of equitable tolling in *Clay v. Kuhl*, 727 N.E.2d 217, 223 (Ill. 2000). Despite this rule, the majority opinion concluded that the Consul General's requests for relief were untimely, because they were not made in 1984, fourteen years *before* the Consul General was alerted to the violation of the Vienna Convention. The majority opinion did not address the application of the doctrine of equitable tolling. However, the dissenting opinions found the circumstances of this case, and the Republic of Poland's belated discovery of the death sentence imposed on its national without notice, to be extraordinary and sufficient to grant relief to the Consul General notwithstanding any applicable statute of limitation. (App. 17a, 20a) Accordingly, because the majority opinion did not apply the doctrine of equitable tolling — a doctrine it had only recently reaffirmed — in circumstances where it was clearly applicable, no adequate state bar exists to consideration of the merits in these cases.

---

5. Indeed, a careful reading of the opinions issued by the dissenting members of the Illinois Supreme Court demonstrates that they determined that the importance of the case to the administration of justice presented sufficient grounds for granting relief. (App. 17a, 18a, 20a) What is more striking is that the Illinois Supreme Court proceeded to consider the merits of an appeal by the State in a different case — argued on the *same day* as this case — based *solely* upon the "general importance of the issue presented to the development of our law," despite the otherwise procedurally improper nature of the appeal. *People v. Ruiz*, 742 N.E.2d 299, 302-03 (Ill. 2000).

Third, the Petitioners also argued that the convictions and sentences in this case were void as to the Consul General because they were entered without his knowledge; the State of Illinois' violation of the Vienna Convention had the insidious effect of preventing the Republic of Poland from discovering the violation of its treaty rights. (Joint Brief at 60-61) In doing so, the Petitioners relied upon several cases, among them *People ex rel. Meyer v. Kerner*, 219 N.E.2d 617, 620 (Ill. 1966), where the Illinois Supreme Court held that where an order of the court will "vitally affect" a party's official functions, failure to bring the party before it and permit the party to be heard results in a void order.[6] The majority opinion did not apply or address these cases, despite their application to the Consul General in this instance. Accordingly, the Illinois Supreme Court's decision is not based upon an adequate state ground.

II. THE PETITIONERS CLEARLY PRESENT IMPORTANT FEDERAL ISSUES FOR REVIEW

The Petition contained a detailed discussion of the importance of the federal issues presented by this case. Petition at 14-20. In essence, the Petition asks this Court to resolve the appropriate remedy for the violation of an international treaty entered into by the United States of America with over 150 other nations, and determine whether the state and federal courts may continue to create their own remedies for violations of this treaty in clear derogation of the remedy mandated by the treaty itself. Three nations already have filed pleadings during the course of this case arguing that the annulment of a death sentence entered in violation of the treaty is mandated. This case is made all the

---

6. Petitioners also cited to *Lerner v. Zipperman*, 387 N.E.2d 946, 950 (Ill. App. Ct. 1979) (court is without power or jurisdiction to enter judgment which affects interests of those not before court); *Horn v. Horn*, 125 N.E.2d 539, 543 (Ill. App. Ct. 1955) (same).

more extraordinary by the fact that a sovereign nation, the Republic of Poland, through the Consul General, is a party to the current proceedings. In addition, the United Mexican States recently has filed an *amicus* brief asking this Court to grant review. All seven members of the Illinois Supreme Court apparently believed that this case presented issues of great public importance and of great importance to the administration of justice. Justice McMorrow noted that this case addressed an "extremely serious matter under international law," while Justice Heiple, joined by Chief Justice Harrison, noted that this case raised "important issues of international relations and the rights of all persons, domestic and foreign. . . ." (App. 18a, 19a) The four-member majority of the Illinois Supreme Court also conceded that the case raised issues of great public importance and of importance to the administration of justice. (App. 11a)

The Respondents therefore appear to be alone in making the bald assertion that no important federal issue is implicated by this case. Opposition at 11-12. The Opposition makes this conclusory assertion even though it does not contest any of the following points raised in the Petition:

- The Vienna Convention, a multilateral treaty entered into between the United States of America and over 150 nations, was violated in this case;

- The Supremacy Clause requires the state and federal courts to construe the Vienna Convention consistent with its terms;

- The Vienna Convention makes customary international law applicable to determine the appropriate remedy for its violation;

- The state and federal courts have erroneously formulated their own remedies for violations of the

Vienna Convention rather than looking to international law;

- *Restitutio in integrum* is the primary remedy for a violation of international law; and

- The interpretation of the Vienna Convention of the state and federal courts to date is in clear derogation of the terms of the treaty and the remedy of *restitutio in integrum*.

See Petition at 5, 14-20. The Respondents' argument, which focuses on procedural issues, completely fails to address the merits of the Petitioner's position concerning the application of international law to this case. The issues presented clearly are significant and merit review.

In arguing no important issue is presented, the Respondents merely note that the Illinois Supreme Court's decision concerning the applicability of the procedural rules of the forum state was correct. However, if as Petitioners argue, there is no adequate and independent state ground barring review (an argument which the Respondents have failed to respond to), it is irrelevant if Illinois' procedural rules govern.

Resolution of this appeal is made all the more important when the prejudicial nature the violation of the Vienna Convention had on the defendant in this case is considered. The Respondents do not contest the allegations in the Petition regarding the prejudice suffered by Gregory Madej as a result of the violation of the Vienna Convention.[7] Accordingly, this Court is presented with a case where :

---

7. In a related note, although the Respondents mention that DNA testing was recently completed in these cases, the Respondents (Cont'd)

- Defense counsel failed to conduct pre-trial investigation to defend Gregory Madej suitably at trial;

- Defense counsel failed to inform Gregory Madej of his right to decide whether or not to testify at trial, and the trial court expressly relied upon his testimony in sentencing him to death;

- Defense counsel performed absolutely no mitigation investigation and presented no mitigating evidence on Gregory Madej's behalf during sentencing proceedings; and

- Defense counsel did not disclose he was a full-time prosecutor for the State of Illinois at the time he represented Gregory Madej at his capital murder trial.

See Petition at 6-7, 20-23. Accordingly, it is clear that the violation of the Vienna Convention was prejudicial and that this case presents an appropriate vehicle to decide the appropriate standard of review under domestic law should this Court find international law does not apply.[8]

(Cont'd)

unfortunately do not disclose to the Court that, as a result of the DNA testing, the State of Illinois' *own* expert has opined that the forensic evidence utilized to convict Gregory Madej of deviate sexual assault more likely than not does not support a finding that anal intercourse occurred. Nor do the Respondents disclose that this non-existent aggravating factor was considered by the trial court in sentencing Gregory Madej to death.

8. To the extent the Respondents seek to imply during their lengthy recitation of Gregory Madej's personal history that Gregory Madej was not entitled to the protections of the Vienna Convention because of his residence in the United States, this is plainly erroneous. Opposition at 5-7. By its terms, the treaty applies to all

(Cont'd)

WHEREFORE, for the foregoing reasons, Petitioners, the Consul General and Gregory Madej, respectfully ask this Court to grant a writ of certiorari in this cause and vacate the judgment of the Illinois Supreme Court.

Respectfully submitted,

DOUGLASS W. CASSEL
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-2224

Attorney for Petitioner Consul General for the Republic of Poland in Chicago

CHARLES F. SMITH
Counsel of Record
CHRISTINA M. TCHEN
AMARJEET S. BHACHU
333 West Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 407-0700

STEPHEN E. EBERHARDT
4744 West 135th Street
Crestwood, Illinois 60445
(708) 371-8560

Attorneys for Petitioner Gregory A. Madej

(Cont'd)
foreign nationals. The Respondents also do not mention that young Gregory Madej's legal representation was arranged for by his parents — two immigrants with limited English language capacity that selected an inexperienced attorney with a conflict. The assistance of the Consul General would have been critical in this case.